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No. 10-914

In the Supreme Court of the United States

MOHAMED POONJA, TRUSTEE,
Petitioner,

v.

JACK TRAMIEL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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I. STATE AVOIDANCE LAW IS SEPARATE AND DISTINCT FROM FEDERAL RECOVERY LAW.

Petitioner[1] asks this Court to grant certiorari to resolve several outcome-determinative conflicts existing between the Decision and cases decided by both this Court and various courts of appeals. The conflicts involve *federal* law because they arise under the §550 *recovery* statute.

Respondent asserts there are no conflicts involving federal law. He maintains that the Decision turns on the application of *state avoidance* law as applied via §544(b). (Thus, Respondent tacitly admits that certiorari would be proper if the conflicts involve federal recovery law under §550.)

Respondent's belief that federal law is not at issue is mistaken. Respondent believes that the Decision uses UFTA §8(d) as a defense to *avoidance* of the Transfer under state law (as made applicable by §544(b)) rather than as a defense to the amount of *recovery* under the federal bankruptcy law, §550. Opp. 1, 16-17. He is wrong. The Code considers avoidance and recovery to be distinct concepts controlled by separate sections. *In re Burns*, 322 F.3d 421, 427 (6th Cir. 2003). And UFTA §8(d) is a recovery statute, not an avoidance statute. *See e.g., Freeman v. First Union Nat.*, 329 F.3d 1231, 1233-34 (11th Cir. 2003) (distinguishing §550 and UFTA §7 [to which UFTA §8 is a defense] from §548 and UFTA §4).

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[1] Petitioner incorporates the defined terms used in his petition.

The Decision clearly treats UFTA §8(d) as a recovery statute by applying it as a defense to §550 and not to §544(b). It expressly states that the Transfer is fraudulent and *void* under *UFTA §4(a)*. It invokes *UFTA §8(d)* only as a defense to reduce *recovery* under §550. It states:

> The *Acequia* test requires that the trustee show *(1) fraud* or illegality; *(2) voidness* of the transfer under §544(b) and applicable law; and *(3) liability* of the particular transferee under §550. [citation omitted.] In this case, the trustee has satisfied *steps one and two* by showing that the real property transfer from JTS to Tramiel was a constructive fraudulent conveyance and *was void* under §544(b) and California Civil Code *§3439.04(a)*. The trustee has also shown that Tramiel has liability for the transfer, but the amount of *recovery* must be calculated to the extent that it benefits the estate, as *§550* expressly requires....
>
> To calculate the amount of *recovery* and abide by the intent of *§550*, we hold that California Civil Code §*3439.08(d)*, the good faith transferee exception, applies in §544(b) cases and, if satisfied, allows for a reduction in the trustee's *recovery*....

App. 23a (emphasis added).

Because the Decision applied UFTA §8(d) as a defense to §550, the resulting conflicts involve federal recovery law. Therefore, certiorari is appropriate on that issue.

The remainder of Respondent's opposition to certiorari also flows from his mistaken view of UFTA §8(d) and whether it results in partial avoidance. He argues that "value" in §550 should equal a property's reasonably equivalent value because the Transfer is partially avoided under UFTA §8(d) to the extent of the Parcels' reasonably equivalent value. And he posits that because the Transfer was only partially void under state law, state procedure should control whether he is entitled to a settlement credit. As explained below, Respondent's positions simply are not grounded in the language of the Decision or in the plain meaning of the relevant statutes.

Last, Respondent attempts to distinguish and discredit Petitioner's authorities. The remainder of this Reply addresses these attempts

II. THE DECISION ACTUALLY CONFLICTS WITH THE SEVENTH CIRCUIT REGARDING WHETHER INITIAL TRANSFEREES MAY ASSERT UFTA §8 DEFENSES.

The Seventh Circuit does not allow initial transferees to assert UFTA §8(d) in §550 actions.[2] *In re Boyer*, 2009 WL 418275, at 16* (N.D. Ind. Feb. 17, 2009), *aff'd Boyer v. Crown Stock Distribution, Inc.*, 587 F.3d 787, 798 (7th Cir. 2009). In stark contrast, the Ninth and Eleventh Circuits allow initial transferees to assert that defense. App. 23a, 25a; *In re Kingsley*,

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[2] Forty-three states and the District of Columbia have adopted UFTA. Alan N. Resnick & Henry J. Sommer, 5 *Collier on Bankruptcy*, § 548.01B (16th ed. 2010).

2007 WL 1491188, at *4-6 (Bankr. S.D.Fla. May 17, 2007), *aff'd* 518 F.3d 874, 877-78 (11th Cir. 2008).

Respondent argues that the Decision is not in actual conflict with *Boyer* because the Seventh Circuit does not discuss *Boyer's* good-faith shareholder transferees' UFTA §8(d) defense. Respondent provides no authority for his position. Appellate courts of appeals need only to consider and necessarily decide an issue to create conflicts worthy of certiorari. *See Anderson v. Celebrezze,* 460 U.S. 780, 784 n.5, 786 & n.6 (1983).

Respondent only disputes whether the Seventh Circuit necessarily decided the issue.[3] He alleges that UFTA §8(d) was rendered moot by the good-faith shareholder transferees' failure to provide value to the debtor. The defense was not moot, and the Seventh Circuit necessarily decided it.

Respondent urges that UFTA §8(d) was moot in *Boyer* because the good-faith shareholder transferees never provided any value. But UFTA §8(d) requires only that transferees act in good faith and that *debtors receive* value; it does not require that good-faith *transferees provide* any value. *Compare* UFTA §8(d) (debtor receiving value) *with* UFTA §8(a) (transferee providing value). Because *Boyer's* good-faith shareholder transferees qualified for a UFTA §8(d) defense by virtue of having acted in good faith and the debtor's having received value, they would have been

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[3] There is no dispute that the Seventh Circuit had the issue before it. *See* Appellee/Cross-Appellant's Brief, 2009 WL 1900130, Argument VII, pages 36-41.

entitled to assert the defense unless it was precluded by §550. And when the lower courts discussed whether UFTA §8(d) was applicable, they considered only whether §550 allowed for it. *Boyer*, 2009 WL 418275 at *15; *In re Crown Unlimited Machine, Inc.*, 2006 WL 6401548 at *12 (Bankr. N.D. Ind. Oct. 13, 2006). They did not discuss whether the good-faith shareholder transferees gave value. Thus, the courts' refusal to allow the defense was necessarily based solely on UFTA §8(d)'s being unavailable under §550.

The lower courts' only discussion regarding whether *Boyer's* good-faith shareholder transferees gave value took place in the narrow context of deciding whether the transferees were eligible for a §550(b) defense. *Boyer*, 2009 WL 418275 at *14-15; *Crown Unlimited Machine,* 2006 WL 6401548 at *14-15. Similarly, the Seventh Circuit's discussion regarding whether *Boyer's* good-faith shareholder transferees gave value also came within only that narrow context. *Boyer*, 587 F.3d at 796. The Seventh Circuit left the lower courts' reasoning and findings undisturbed regarding their refusal to allow UFTA §8(d). Otherwise, the Seventh Circuit would had to have granted the UFTA §8(d) defense to the good-faith shareholder transferees because the debtor received value.

Based on the above, Respondent's argument serves as no barrier to finding that *Boyer* constitutes an actual conflict with the Decision (and *Kingsley*) that is worthy of certiorari under *Anderson*.

III. THE DECISION ACTUALLY CONFLICTS WITH VARIOUS COURTS OF APPEALS REGARDING WHETHER INITIAL TRANSFEREES ARE STRICTLY LIABLE IN §550 ACTIONS.

The Second, Sixth, and Tenth Circuit Courts of Appeals hold that initial transferees are *strictly liable* under §550. *See e.g., In re Red Dot Scenic, Inc.*, 351 F.3d 57, 58 (2nd Cir. 2003); *In re Hurtado*, 342 F.3d 528, 532-33, 534 n.2 (6th Cir. 2003); *Rupp v. Markgraf*, 95 F.3d 936, 944 (10th Cir. 1996). Nonetheless, the Decision finds Respondent has no liability despite being an initial transferee.

Respondent argues that the other courts of appeals' cases are not in actual conflict with the Decision because they are distinguishable. He asserts that, unlike the other cases, the Decision involves "whether the transaction itself is *avoidable* and, if so, in what amount." Opp. 18 (emphasis added).

Respondent's distinction is faulty. As discussed above, he erroneously assumes that UFTA §8(d) is a defense against avoidance rather than against recovery. Thus, the above cases are not distinguishable.

IV. THE DECISION ACTUALLY CONFLICTS WITH THIS COURT REGARDING §550'S PLAIN MEANING AND THE NECESSITY OF APPLYING THAT PLAIN MEANING.

§550 contains the common limiting phrase "[e]xcept as otherwise provided in this section." §550's limiting phrase refers to the defenses expressly provided in

§550(b)-(f). This Court has established that the limiting phrase's plain meaning renders *exclusive* those provisions to which it refers. *Crosby v. U.S.*, 506 U.S. 255, 258-59 (1993)(Fed.R.Crim.P. 43), *see also U.S. v. Gbemisola*, 225 F.3d 753, 758 (D.C. Cir. 2000)(contrasting 18 U.S.C. §3117 with 18 U.S.C. §§2511(a), 3121(a)). Any other interpretation of the limiting phrase would affect the exclusivity of the other 11,025 federal code sections, rules, and regulations in which it appears.[4] Thus, as a matter of the limiting phrase's plain meaning, §550's expressly provided defenses are exclusive of all other defenses, including UFTA §8(d).

This Court also holds that a statute's plain meaning must be applied regardless of the statute's history or underlying policy. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Consequently, the Decision actually conflicts with *Crosby* and *Lamie* because, rather than holding that §550's defenses are exclusive and barring UFTA §8(d), it applies UFTA §8(d) as a defense to §550 recovery.

In addition to failing to consider *Crosby* or *Lamie*, Respondent misapplied §550 by *literally* eliminating the limiting phrase that controls its defenses' exclusivity.[5] Instead, he focuses on the phrase "to the

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[4] Computed via Westlaw.

[5] In relevant party, §550 reads as follows:

> *Except as otherwise provided in this section*, to the extent that a transfer is avoided under section 544 ...

(emphasis added)

extent," which immediately follows the limiting phrase. He argues that, because the Transfer is only partially void under §544(b), §550 allows a recovery of the value of the Properties "to the extent" of the partial avoidance. Opp. 21-22. As discussed above, Respondent mistakenly presumes that the Decision found the Transfer was only partially avoided.

Respondent also disputes whether the Decision actually conflicts with *In re Straightline Investments, Inc.*, 525 F.3d 870 (9th Cir. 2008). He attempts to distinguish *Straightline* because its avoidance took place under §549(a) rather than under §544(b). But that factual distinction is immaterial. As here, *Straightline's* transfer was fully avoided, and the transferees' attempt to assert a state law defense involved §550, not the Code's avoidance sections.

Additionally, Respondent contends that the Decision and *Straightline* do not actually conflict because he acted in good-faith and the *Straightline* transferee engaged in inequitable conduct. Respondent's contention is false. *Straightline* specifically noted that §550's preclusion of state law

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As in the Decision, App. 15a, Respondent's reference to §550 omits the limiting phrase and quotes only the text immediately following it. He states:

> Section 550(a) provides that the trustee may recover from initial transferees either the property transferred or the value of such property, but only *"to the extent that a transfer is avoided under section 544."*

Opp. 21 (emphasis added).

defenses applied equally to good-faith transferees. It stated:

> *Even a good faith transferee* is not protected beyond a possible lien on the property, and he is only protected if he is the initial transferee. *Id.* §550(a)-(b), (e). Section 550 is thus substantially less protective of transferees than it is of the estate.

Straightline, 525 F.3d at 884-85 (emphasis added).

Respondent alleges that even if the Decision and *Straightline* actually conflict, certiorari still would be inappropriate because it would be an intracircuit conflict. *Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948), and *John Hancock Mut. Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 & n.1 (1939), however, demonstrate that intracircuit conflicts are sufficient to grant certiorari in bankruptcy matters.

Finally, Respondent denies that the Decision partially relied on its novel belief that "recoveries available under state law through Section 544(b) must be the same as those available under federal law in Section 548." Opp. 23. But the Decision clearly requires symmetry between §548(c) and §544(b). App. 23. It states:

> Moreover, allowing state law good faith transferee exceptions in cases asserting §544 claims permits a symmetry with the Bankruptcy Code: §548 of the Bankruptcy Code, which voids fraudulent transfers under federal law, allows for a reduction in recovery due to a

> good faith transferee. *Section 544(b) ... should reflect this symmetry.*

App. 25a (emphasis added).

V. THE DECISION ACTUALLY CONFLICTS WITH THIS COURT AND VARIOUS COURTS OF APPEALS REGARDING THE MEANING OF "VALUE."

This Court found that the ordinary meaning of "value" is *fair market value*. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537-38, 547-48 (1994). A fundamental canon of statutory construction is that statutory terms are given their ordinary meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). Thus, this Court assigned to "value" its ordinary meaning to describe the worth of property that is not subject to foreclosure. *BFP*, 511 U.S. at 537-38, 547-48 (construing §548); *American Commercial Corp. v. Rash*, 520 U.S. 953, 960-65 (1994)(construing §506(a)). The ordinary meaning of "value" should carry over into §550 because Code provisions used in different sections should share the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). The above precedents actually conflict with the Decision, which defines "value" in §550 as a property's *reasonably equivalent value*.

Respondent attempts to distinguish *BFP* and *Rash*, arguing they define "value" only for purposes of federal law. But §550 is federal law. Thus, *BFP* and *Rash* are controlling precisely because they define "value" for purposes of federal law.

In fact, reasonably equivalent value cannot determine liability under §550 because it represents a relationship, not an actual value. Reasonably equivalent value represents only a comparative relationship between two other values – *i.e.*, a transferred property's actual value and the value of the consideration paid for it. *See In re Fruehauf Trailer Corp.*, 444 F.3d 203, 212–13 (3rd Cir. 2006); *In re Fordu*, 201 F.3d 693, 707 (6th Cir. 1999); *Barber v. Golden Seed Co., Inc.*, 129 F.3d 382, 387 (7th Cir. 1997); *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466–67 (4th Cir. 1990).

Finally, Respondent asserts that to interpret "value" under §550 to mean fair market value would not impact his liability, which is zero under the Decision. This assertion is overly presumptuous and mathematically incorrect. It is based on three presumptions: 1) §550 allows him to assert a state law defense reducing his liability by the $10,432,815 he paid; 2) he is entitled to a $4,500,000 settlement credit based on state procedure (discussed below); and 3) the first two presumptions will completely eliminate his liability for the Properties' $17,147,185 fair market value. The first two presumptions are unsupported by the law. The third is wrong as a matter of arithmetic.

VI. THE DECISION ACTUALLY CONFLICTS WITH THIS COURT AND VARIOUS COURTS OF APPEALS REGARDING WHETHER FEDERAL PROCEDURE SHOULD DETERMINE THE AWARD OF SETTLEMENT CREDITS IN §550 RECOVERY ACTIONS.

Federal procedure controls actions involving claims arising under federal schemes that require uniformity. *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991); *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979). Under federal procedure, the two criteria for allowing settlement credits are: (1) a finding that the settling and non-settling defendants are jointly liable; and (2) an allocation of relative culpability. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 216-17, 218-21 (1994).

Bankruptcy is a federal scheme that requires uniformity. U.S. Constitution, Article I, Section 8, Clause 4. Thus, §550 recovery actions are subject to federal procedure, *In re Prudential of Florida Leasing Inc.*, 478 F.3d 1291, 1298-99, 1301-02 (11th Cir. 2007), and *McDermott's* federal criteria are applied to determine whether settlement credits are appropriate in §550 actions. *Bowers v. Kuse Enters., Inc.*, 1998 WL 957455, at *7 (4th Cir. Sept. 22, 1998); *In re Lendvest*, 42 F.3d 1181, 1184 (9th Cir. 1994).

Respondent argues that *Prudential of Florida*, *Bowers*, and *Lendvest* are distinguishable because they discuss only whether federal procedure is applicable to §550, not whether it is applicable to the underlying state avoidance statutes. But it is the §550 recovery liability that will affected by any settlement credit, not

avoidance. Thus, it is the federal nature of §550 that controls which procedure applies.

In the alternative, Respondent argues that if federal procedure does control, the federal criteria for him to receive a settlement credit are met. Untrue.

Respondent alleges that the bankruptcy court found joint liability. But that court found only that Petitioner's complaint alleged joint liability, which is singularly sufficient to grant a settlement credit under *state law*. Pet. 7 n.6, 11 n.7. It did not find actual joint liability, which is what *federal procedure* requires for awarding settlement credits.[6] Pet. 30 n.19.

Respondent's assertion that the bankruptcy court allocated culpability is equally flawed. He relies on the bankruptcy court's oral comment that any allocation the court *would have* made would have satisfied California's allocation requirement. App. 148a. Unlike federal law, California law only requires an allocation of *liability*, which is not required to equal the parties' share of *culpability*. *Rutgard v. Haynes*, 61 F.Supp.2d 1082, 1086 (S.D.Cal. 1999)(culpability does not necessarily equal an allocation of liability in a settlement credit because culpability is only one factor used to determine the allocation of liability), *citing Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 499 (1985). In fact, "culpability" and "liability" represent different concepts and their

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[6] Respondent alleges that the Decision's determination that the bankruptcy court found joint liability is a matter of fact. Respondent provides no authority stating that such a determination is one of fact rather than of procedural review.

allocations serve different functions. "Culpability" connotes blameworthiness. *Black's Law Dictionary*, at 385 (7th ed. 1999). Its allocation promotes fairness between jointly liable co-defendants. *Baird v. Jones*, 21 Cal. App. 4th 684, 689-93 (1993). "Liability," however, means a legal obligation. *Black's*, at 925. And its allocation functions to prevent plaintiffs from receiving double recoveries for the same injury. *McComber v. Wells*, 72 Cal. App. 4th 512, 517 (1999). Consequently, the bankruptcy court's statement was not an allocation of culpability.

CONCLUSION

For the above reasons, not only should the petition for certiorari be granted, but grounds exist for a summary reversal. *Felkner v. Jackson*, 131 S.Ct. 1305 (2011).

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Respectfully submitted,

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